No. 85-1594

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNIONS NO. 215, 297, 504, 521, 577, 709 AND 762, AND INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, SOUTHERN ASSOCIATION OF IATSE DISTRICT NO. 2 LOCALS, AFL-CIO, AND ITS CONSTITUENT LOCAL UNION NO. 294,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD
and
UNITED ARTISTS COMMUNICATIONS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNITED ARTISTS COMMUNICATIONS, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), require a non-initiating party to give notice to the federal and state mediation services before engaging in otherwise lawful economic action, where the initiating party has defaulted on its obligation to give such notice?

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Respondent United Artists Communications, Inc. (United Artists)[1] respectfully requests that this Court deny the Petition of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Southern Association of IATSE District No. 2 Locals, AFL-CIO, and its Constituent Local Unions, including Local Union No. 294, (Petitioners) for a Writ of Certiorari in this case seeking review of the Judgment of the United States Court of Appeals for the Ninth Circuit entered on December 30, 1985.

COUNTER STATEMENT OF THE CASE

The IATSE and its Constituent Local Unions historically represented United Artists' projectionists in Southern California and Phoenix, Arizona.[2] The last collective bargaining agreements covering the projectionists expired on January 31, 1982, and shortly before that expiration, the Unions initiated the bargaining process for a new agreement. Thus, in compliance with section 8(d)(1) of the National Labor Relations Act (Act), 29 U.S.C. § 158(d)(1), the Southern California Locals notified United Artists by letter, dated December 1, 1981, of their desire to negotiate a new collective bargaining agreement and similarly, the Phoenix Local notified United Artists by telegram on May 7, 1981. (Pet., App. A at 5-6 and note 3.) The Unions sought to extend the term of the collective bargaining agreement then in force for one year. United Artists sought to modify the terms of the agreement to permit more efficient use of new technological advances in projection equipment. Old equipment required the constant attention of the projectionists during the film showing, while new equipment allowed one projectionist to move from

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[1] Respondent United Artists Communications, Inc., is a Maryland corporation. It has no parent corporation and has one non-wholly owned subsidiary or affiliate, Magna Pictures.

[2] Following issuance of the National Labor Relations Board's February 1985 decision in this matter, the parties returned to bargaining and reached negotiated settlements under which United Artists' employment of all projectionists represented by District 2 and Local 294 ended on March 21, 1985 and June 1, 1985, respectively.

theatre to theatre performing maintenance work and setting up films as needed. The new equipment significantly reduced the number of projectionists needed.

The Unions and United Artists conducted a series of 16 negotiation sessions beginning January 21, 1982, and ending in the fall of that year without agreement. United Artists presented its final offer to the Southern California Locals on September 9 and to the Phoenix Local on November 8, and unilaterally implemented its offers on October 11 and December 6, respectively. Strikes followed the implementation of the changes.

During the bargaining process neither the Unions nor United Artists formally notified the mediation services within the 30 days of the 60-day notice of section 8(d)(1) as required by section 8(d)(3) of the Act, 29 U.S.C. § 158(d)(1) and (3). However, despite the lack of formal notice, the Federal Mediation and Conciliation Service knew of the disputes and participated without success in additional negotiations on November 8, 1982 and January 20, 1983. United Artists eventually provided formal notice to the mediation services on January 23, 1983, after it already implemented unilateral changes.

On November 1, 1982 and March 7, 1983, the Southern California Locals and the Phoenix Local respectively filed charges against United Artists with the National Labor Relations Board (Board). The Unions charged that United Artists committed an unfair labor practice by violating section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5), by implementing unilateral changes absent the requisite notice of the mediation services required by section 8(d)(3) and (4).

An Administrative Law Judge of the National Labor Relations Board found that United Artists violated section 8(d) of the Act by implementing its final offer before the mediation services had been notified. The Judge concluded that while the language of the Act did not appear to place any notification obligation on a "non-initiating" party such as United Artists, the Judge felt himself bound by the Board's previous decisions in *Peoria Chapter of Painting & Decorating Contractors of America,* 204 NLRB 345 (1973), enforcement denied, *N.L.R.B. v. Peoria Chapter of Paint-*

ing & Decorating Contractors of America, 500 F.2d 54 (7th Cir. 1974), and *Hooker Chemicals & Plastics Corp.*, 224 NLRB 1535 (1976), enforcement denied, *Hooker Chemicals & Plastics Corp. v. N.L.R.B.*, 573 F.2d 965 (7th Cir. 1978), where the Board had found that a non-initiating party was required to provide notice to the mediation services if the initiating party had defaulted on that obligation. The Judge felt bound by those Board decisions even though enforcement of the decisions had been denied by the Seventh Circuit Court of Appeals on review. (Pet., App. B at 37-44.)[3]

After the filing of exceptions to the Administrative Law Judge's decision, the Board reversed and found *no* violation of the Act by United Artists. In reconsidering the language of the Act, the Board found that section 8(d) imposed *no* burden on United Artists as a non-initiating party to notify the mediation services where the Union, as initiating party, had failed to do so. The Board therefore found that the unilateral changes made by United Artists as a non-initiating party was consistent with the Act since the 60-day period in section 8(d)(1) and (4) had expired. In reversing, the Board expressly abandoned its earlier position taken in *Peoria Painting* and *Hooker Chemicals*, and instead adopted the position taken by the Seventh Circuit in denying enforcement of the two previous Board decisions. (Pet., App. C at 8-14.)

On appeal by the Petitioners, the Ninth Circuit Court of Appeals affirmed the decision of the Board below. The Court concluded that the Board's current interpretation of the statute was "reasonably defensible" in that that interpretation was consistent with the language of the statute and the corresponding legislative history, and the Board's current interpretation provided the needed incentive to ensure notification to the mediation services. (Pet., App. A at 11-15, 20-22.)

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[3] Consistent with existing Board precedent in *Fox Midwest Theatres, Inc.*, 158 NLRB 1096 (1966), the Administrative Law Judge did not order any backpay remedy. The Judge found that such a remedy would be punitive under the circumstances of this case, where United Artists' implementation of its final offers came only after many months of good faith bargaining which resulted in a clear impasse between the parties.

REASONS FOR DENYING THE PETITION

Respondent United Artists submits that the Petition should be denied because the question presented by this case was *properly* decided in accordance with statutory language and the intent of Congress, is *not* the subject of conflicting opinions in the Courts of Appeals, is *not* in conflict with any opinion of this Court, and does *not* raise a significant issue in the administration of the National Labor Relations Act warranting the review of this Court.

1. The Decisions Of The Board and Court of Appeals Below Are Consistent With The Language Of The Statute

The finding by the Board and the Ninth Circuit below that section 8(d) *cannot* be read to place any notification requirement on the non-initiating party is in full accord with the language of the Act itself. Section 8(d)(1)-(4) establishes four notice and waiting period requirements.[4] The statute also clearly indicates *who* must meet the four requirements—namely, "the party seeking such termination or modification." There is absolutely no statutory basis for finding that any of the obligations of section 8(d)(1)-(4) are applicable to any party other than "the party desiring such modification or termination." If Congress had intended that *all* parties to negotiations be required to fulfill the 8(d) requirements, it could have said "all parties" rather than "*the* party desiring such modification or termination." Finally, the Board and the Courts have long agreed that "the party seeking such modification or termination" means *only* the party initially reopening the contract (the "initiating party") and that the burden does not shift depending upon the bent of negotiations. *Fort Smith Chair Company*, 143 NLRB 514 (1963), enforced *sub nom., United Furniture Workers, Local 270 v. N.L.R.B.*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964); *Hooker Chemicals & Plastics Corp. v. N.L.R.B.*, 573 F.2d 965 (7th Cir. 1978); *N.L.R.B. v. Mar-Len Cabinets, Inc.*, 659 F.2d 995 (9th Cir. 1981). As the Board and the Courts have uniformly held that

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[4] The relevant portions of section 8(d) are attached as an Appendix to this brief.

the non-initiating party does not become "the party seeking such modification or termination" simply because it later seeks termination of the contract, it *must* follow that the non-initiating party is *not* required to meet the obligations of section 8(d)(3) or (4) since again the 8(d) requirements apply *only* "to the party seeking such modification or termination."

The Petitioners in their Petition to this Court make *no* attempt to challenge the construction of the language of the Act rendered by the Board and Ninth Circuit below, except to suggest that "the party desiring such modification or termination" should not be synonymous with the initiating party. Instead, Petitioners urge this Court to adopt the uniformly rejected concept that the "desiring" party be determined by the position taken during the course of negotiations. The Petitioners, however, cite absolutely no statutory, legislative or judicial support for their half-hearted challenge to the long-standing and uniform interpretation of the Act applied by the Board and Court of Appeals in this case.

2. The Decisions of the Board and the Ninth Circuit Below are in Full Accord with the Decisions of the Other Court of Appeals to Address this Issue

Petitioner does not and *cannot* claim that the decision of the Board below as affirmed by the Ninth Circuit is in conflict with the opinion of any other Court of Appeals. On the contrary, those decisions are in *full* accord with the previous rulings of the Seventh Circuit Court of Appeals in *N.L.R.B. v. Peoria Chapter of Painting & Decorating Contractors of America*, 500 F.2d 54 (7th Cir. 1974), and *Hooker Chemicals & Plastics Corp. v. N.L.R.B.*, 573 F.2d 965 (7th Cir. 1978).

For years the Board held that under section 8(d) *only* the initiating party had any obligation to give notice to the mediation services and that a non-initiating party did not violate the Act by failing to give such notice prior to taking economic action. *See, Royal Packing Company*, 198 NLRB 1060 (1972). In *Peoria Painting & Decorating Contractors*, 204 NLRB 345 (1973), however, in a sudden and unexplained departure from this precedent, an administrative law judge of the Board, concluded without any examination of the actual language of the Act, that since

affording notice to the mediation services was an integral part of the statutory scheme, that a non-initiating party was not privileged to resort to economic action without giving its own notice to the mediation services if the initiating party defaulted in meeting that obligation. On review, the Seventh Circuit Court of Appeals forcefully rejected this quantum leap made by the administrative law judge in *Peoria Painting*. The Seventh Circuit in *N.L.R.B. v. Peoria Chapter of Painting & Decorating Contractors of America, supra*, concluded that the notification requirements of the Act could not be transferred to a non-initiating party simply through an initiating party's default. The Seventh Circuit concluded that while notification of the mediation services was an important statutory goal, Congress chose *one* party, the initiating party, upon which to place the burden of giving the required notice to the mediation services.

In *Hooker Chemicals & Plastics Corp.*, 224 NLRB 1535 (1976), a panel of the Board had an opportunity to review its earlier decision in *Peoria Painting* in light of the Seventh Circuit's denial of enforcement in that case. In *Hooker Chemicals*, the Board reaffirmed its prior ruling in *Peoria Painting* but inexplicably failed to address the Seventh Circuit's conclusion that the plain language of the statute could not support a violation of section 8(d) by a non-initiating party. Instead, the Board panel once again based its decision solely on the ground that alternative notification by a non-initiating party would further facilitate intervention by the mediation services. Once again, however, the Seventh Circuit Court of Appeals in *Hooker Chemicals & Plastics Corp. v. N.L.R.B., supra*, refused to enforce the Board's ruling. The Court of Appeals in *Hooker Chemicals* again concluded that the Board's ruling was an unnecessary "perversion" of the language of section 8(d) and the Court refused "to enforce this construction of 8(d) because it requires contorting the statute's plain language without any clear indication of legislative intent suggesting such a perversion." (573 F.2d at 968.) The Seventh Circuit again found that Congress' purpose in having the mediation services involved in dispute resolution in a timely manner was sufficiently met by Congress' decision to place the burden of notifying the mediation services on one party, the initiating party.

In the instant case, the Board below reconsidered its position and concluded this time, as had the Seventh Circuit twice before, that the obligations of section 8(d)(1)-(4) lie solely with the initiating party. In this regard, the Board declared:

> [I]t is evident from a fair reading of section 8(d) that the notice burdens of that provision fall exclusively, in the words of the statute, on the "party desiring such termination or modification." (Pet., App. C at 11.)

Therefore, recognizing its previous error, the Board properly overruled its earlier decisions in *Peoria Painting* and *Hooker Chemicals* and held:

> Because the Board's rationale in *Peoria Painting* and *Hooker Chemicals* effectively places the burden of notification on the non-initiating party, it is at odds with the language of the statutes written by Congress. . . . We now hold that the burden of notifying the mediation services of a dispute under section 8(d)(3) and (4) rest exclusively with the initiating party and that the initiating party's failure to file such notice cannot serve to preclude the non-initiating party from undertaking otherwise lawful economic action. (Citation omitted.) (Pet., App. C at 13-14.)

On review, the Ninth Circuit concluded that the Board's new interpretation adopting the Seventh Circuit's previous holdings was a "reasonably defensible" interpretation of the statute. The Ninth Circuit, after reviewing the language of section 8(d), also concluded that the Seventh Circuit and the Board's current holding were correct that "the statute places no such enumerated duties exclusively on the non-initiating party," and that "the Board's current interpretation provides the needed incentive to ensure notification to the mediation services . . . ." (Pet., App. A at 13, 22.)

Thus, completely contrary to the contention of Petitioners, the rulings of the Board and the Ninth Circuit below do *not* run counter to the way the Board and the Courts have previously read

the statute,[5] but rather return the Board to its original position and are fully consistent with the earlier rulings of the Seventh Circuit Court of Appeals. As a result of the rulings below there is now a *unified* interpretation of section 8(d) of the Act. Thus, there is *no* conflict between the Circuits which requires resolution by this Court.

3. The Decisions Below Are *Not* In Conflict With Any Opinion Of This Court

Next, contrary to the Petitioners' assertion, there is *no* conflict between the decisions of this Court and the rulings by the Board and Ninth Circuit below. This Court's language in *N.L.R.B. v. Lion Oil*, 352 U.S. 282 (1957), and *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956), to the effect that section 8(d)(4) "is susceptible to various interpretations" and that the Court should avoid a "narrowly literal construction of the words of the statute" (352 U.S. at 288 citing 320 U.S. at 285-286) did *not* involve the issue presented in this case—namely, the rights and obligations of the non-initiating party where the initiating party has defaulted on its obligations to notify the mediation services. The Seventh Circuit Court of Appeals in *N.L.R.B. v. Peoria Painting, supra*, specifically considered the statements of this Court in *Lion Oil* and *Mastro Plastics* and correctly concluded that this Court's pronouncements did not require the distorted construction of the language of the Act again being sought by the Petitioners herein. The Seventh Circuit declared in this regard:

> We recognize . . . that other aspects of section 8(d) and especially section 8(d)(4) are "susceptible to various interpretations" and "subject to ambiguity." We are satisifed, however, that none of the ambiguities mentioned in the above citations are relevant to the issue presented in this case nor bar our reliance on the plain words of this aspect of the statute. (Citations omitted.) (500 F.2d at 57, n. 2.)

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[5] Indeed, the Petitioners' complete failure in its Petition to directly address or even advise this Court of the nature of the Seventh Circuit's previous rulings on this issue is a blatant and inexcusable omission.

Moreover, this Court in *Lion Oil* and *Mastro Plastics* simply instructed that the courts should, where possible, avoid a construction that does not further Congress' aim to "substitute collective bargaining for economic welfare . . ." As the Seventh Circuit, the Board and the Ninth Circuit now uniformly recognize, the Board's present construction of the Act still fully serves the policy of providing notification to the mediation services, but does so "in the method Congress chose to serve this purpose . . . to assign to one party, the initiating party, fixed and definite responsibility for notifying the mediation services." (*Hooker Chemicals & Plastics Corp. v. NLRB, supra* at 970.) Thus, the decisions by the Board and Ninth Circuit below are *not* in conflict with this Court's pronouncements in *Lion Oil* or *Mastro Plastics*.

4. The Rulings Below Will Not Significantly Change The Conduct Of Collective Bargaining And Therefore Do Not Warrant Review As A Significant Issue In The Administration Of The Act

Finally, the Petitioners' claims that the Board's decision as affirmed by the Ninth Circuit below will have a destabilizing effect on labor relations by encouraging labor disputes is also completely without substance. The Petitioners' view of the bargaining process is totally unrealistic. The assertion that each side will seek to avoid being the initiating party in order to be able to take economic action without having to give notice, completely ignores the fact that a vast majority of collective bargaining agreements contain termination clauses which provide for automatic renewal if neither party reopens the contract in a timely manner. Thus, if each party for some reason chose to delay reopening so as not to be the initiating party, the collective bargaining agreement would automatically renew and *no* economic action whatsoever could be taken. The Seventh Circuit in *Hooker Chemicals & Plastics Corp. v. N.L.R.B., supra* at 970, was also easily able to respond to the "first strike capability" argument again made here by the Petitioners. The Seventh Circuit declared:

> The restraint imposed on the initiating party may be viewed as an incentive to fulfill its statutory duty to give timely

notice; the initiating party need only perform its statutory duty to avoid the restraint.

The Ninth Circuit Court of Appeals below specifically found this response by the Seventh Circuit to be persuasive. (Pet., App. A at 22).

Indeed, the Petitioners' entire discussion regarding the so-called "tactical advantage" which can result from not notifying the mediation services is grossly overstated. Strikes and lockouts are economic actions that are not taken lightly due to the costs attendant with such actions, and as such normally occur only after a clearly recognizable breakdown in contract negotiations. Therefore, strikes and lockouts are rarely "quickie" surprise actions.[6] The fallacy of the Petitioners' argument that the Board's decision will promote economic strife is most easily seen by the fact that the Board's ruling below is simply a return to the position the Board held prior to 1974 and is in accord with the status of the law as it has existed without interruption in at least the jurisdiction of the Seventh Circuit Court of Appeals. Petitioners can point to *no* showing that any of the parade of horribles it now envisions had existed prior to 1974, or that labor relations for the past dozen years have been more unstable or that "quickie" disputes have been more prevalent in the jurisdiction of the Seventh Circuit Court of Appeals. As such, no significant issue warranting review is presented by this case.

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[6] Contrary to Petitioners' implication, neither the Board nor the Ninth Circuit's opinion affected the *additional* language included in the final paragraph of section 8(d) of the Act, which addresses the special consequences of employees striking before proper notice is given.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be denied.

DATED: April 18, 1986.

Respectfully submitted,

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(Appendix A follows)

APPENDIX A

The relevant provisions of the Labor Management Relations Act, 1947, as amended (61 Stat. 136, 37 Stat. 519, 88 Stat. 395, 29 U.S.C. §§ 151-168), are as follows:

* * *

UNFAIR LABOR PRACTICES

Section 8(a) [29 U.S.C. § 158(a)] It shall be an unfair labor practice for an employer—

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies

any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . .